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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/784,980	02/16/2001	Anthony John Bell	5641C1-07-LAV	5253
7590 08/12/2008				
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EXAMINER				
CHAWLA, JYOTI				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
08/12/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 09/784,980	Applicant(s) BELL ET AL.
Examiner JYOTI CHAWLA	Art Unit 1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 02 June 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☒ Applicant's reply has overcome the following rejection(s): 112 (first paragraph) & some 112 (second paragraph).
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: None.
Claim(s) objected to: _____.
Claim(s) rejected: 1-9, 28-36 and 55.
Claim(s) withdrawn from consideration: 10-27 and 46-54.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794

Continuation of 11. Applicant's amendments dated June 2, 2008 have been entered, however the amendments do NOT place the application in condition for allowance because:

I) Applicant's amendments and remarks filed June 2, 2008 have been entered and they overcome the following rejections. The claim rejections made under 35 USC 112 (first paragraph), for failing to comply with the written description requirement for the term "alone" on pages 2-3 of final office action of 2/26/2008, have been withdrawn in light of applicant's amendments to claims 1, 28 and 55.

The claim rejections made under 35 USC 112 (second paragraph), for lack of antecedent basis for "said amount" on page 3 of final office action of 2/26/2008, have been withdrawn in light of applicant's amendments to claims 1. The claim rejections made under 35 USC 112 (second paragraph), for "amount being effective alone to suppress said unpleasant mouthfeel of said botanical" on page 4 of final office action of 2/26/2008, have been withdrawn in light of applicant's amendments to claims 1, 28 and 55.

II) Applicant's amendments and remarks filed June 2, 2008 have been considered but are not deemed persuasive (Remarks, pages 6-11). The rejections are maintained for reasons of record, as set forth in the final office action dated February 26, 2008

Applicant's traversal of the rejection of term "unpleasant mouthfeel" under 112(second paragraph) and related arguments have not been found persuasive. Applicant has provided examples of the term in the original disclosure, however, the term "unpleasant mouthfeel" has not been specifically defined in applicant's disclosure in such a way as to overcome the rejection. The term "unpleasant mouthfeel" renders the claim indefinite and the reasons have been provided on pages 3-4 of the final office action dated 2/26/2008. Applicant's argument that the term "unpleasant mouth feel" is specifically associated with botanicals (Remarks, page 6, last paragraph) is not persuasive because unpleasant mouth feel can be due to sensations, such as, burning or tingling or texture or stickiness or grittiness or pungency from components like capsaicin. However, the term "unpleasant mouth feel" is a relative term, where a flavor, such as capsaicin might provide unpleasant mouth feel for one individual, it might be desirable and pleasant for another. Thus the rejection of term "unpleasant mouthfeel" under 112 (second paragraph) has been maintained for the reasons of record.

III) In response to applicant's arguments against the references individually (Remarks, pages 7-11), one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Applicant's argument that "Katsuragi teaches a specific class of bitterness-relieving agents, which are not the ones claimed in the present Application" (page 10, lines 8-10). Applicant also alleges that Katsuragi does not teach of the addition of fats. Applicant's argument is not persuasive because fats are glycerol esters of fatty acids, such as stearic acid and Katsuragi teaches of stearic and lauric acids (page 3, line 17). Further, Katsuragi also teaches of addition of fats including cottonseed, soybean, palm, coconut, sunflower or corn, palm kernel, milk (fat, i.e., butter) as claimed by the applicant. The reference also teaches that the fats can be hydrogenated and used either alone or in combination (Page 3, line 19, 58-59; Page 4, lines 1-4; Example 11 on page 10 and Example 20 on page 14). Seang, also teaches of masking the flavor of drug by mixing it with lipid. Seang also teaches that the lipids can be saturated or unsaturated aliphatic acids, hydrogenated or partially hydrogenated oils, such as cottonseed oil, coconut oil etc (Abstract and Page 6, lines 5-15). Thus, both references teach of addition of fats, as recited by the applicant. Therefore, applicant's argument that fats are not taught by the prior art has not been found persuasive.

IV) Applicant's argument that "the combination of two references requires one of ordinary skill in the art to engage in extensive experimentation and hindsight in order to arrive at the presently claimed invention" (Remarks, page 10, last paragraph, lines 4-6) is not convincing. Applicant's argument is not convincing as obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). Further, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As the references of record were published before the time the invention was made, the references of record would be knowledge generally available to one of ordinary skill in the art at the time the invention was made and thus the knowledge contained therein would be available to one of ordinary skill in the art. Furthermore, the fact that all the references used in the rejection have publication dates before the filing date of applicant's application indicates that the effect of lipids in masking the unpleasant or bitter flavors, as claimed, was well known in the art. Thus, to support the primary reference by providing a teaching to the fact that lipids contributed to masking the unpleasant flavors in compositions, as taught by the secondary reference (Seang) would have been readily apparent to one skilled in the art at the time the invention was made. The rejection is not based on hindsight if the knowledge is obtained from the teaching of the prior art.

Therefore, applicant's remarks filed June 2, 2008 have been considered, but have not been found persuasive and the rejections of claims 1-9, 28-36 and 55 are maintained for reasons of record.